Supreme Court, U.S.
FILED
MAY 26 1992
OFFICE OF THE CLERK

No. 91-1710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TOYOTA MOTOR CORPORATION, TOYOTA MOTOR SALES, U.S.A., GULF STATES TOYOTA, and TOYOTA SOUTH, INC.,

Petitioners,

v.

THE HONORABLE SHAROLYN WOOD, Judge, 127th Judicial District Court, Harris County, Texas, (M. JACK HENRY, and JANET HENRY, Individually, and M. JACK HENRY, Guardian of the Person and Estate of KAREN HENRY, and Ron Manning, as Representative of the Estate of JUDY NELSON MANNING, Real Parties In Interest),

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

RESPONDENTS' BRIEF IN OPPOSITION

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THE HONORABLE SHAROLYN WOOD, Judge, 127th Judicial District Court, Harris County, Texas, (M. JACK HENRY and JANET HENRY, Individually, and M. JACK HENRY, Guardian of the Person and Estate of KAREN HENRY, and RON MANNING, as Representative of the Estate of JUDY NELSON MANNING, Real Parties in Interest),
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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, M. Jack Henry and Janet Henry, Individually, and M. Jack Henry, Guardian of the Person and Estate of Karen Henry, submit this brief in support of their request that certiorari be denied.

STATEMENT OF THE CASE

The petition challenges the right of a state, consonant with due process, to preclude mandamus review of a trial court's grant of a new trial. This very question has already been before this Court this term and the Court denied certiorari. *See Avala of Texas, Inc. v. The Honorable David West*, October Term 1991 (No. 91-830).

1. This case arose from an automobile collision in which Karen Henry was rendered brain damaged and suffered the loss of use of her limbs. The Petitioners acknowledged in the trial court that Ms. Henry was an "innocent victim" in this tragedy. *See* Petition for Certiorari at 12a.

2. After the jury returned a verdict which exonerated the only parties that could have caused the collision, the other driver and the manufacturer of the other car, Ms. Henry's parents filed a timely motion for new trial. That motion for new trial is reproduced in the Petition at 40a-46a. Within the time prescribed for her plenary jurisdiction, Judge Wood held a lengthy hearing on the motion. *See* Petition at 5a-39a. Two days later, Judge Wood issued an order which stated that "[u]pon consideration [of plaintiffs' motion for new trial], this Court is of the opinion that a new trial should be granted." *Id.* at 4a.

3. After Judge Wood's order of new trial, the Petitioners took no action in the trial court. The Petitioners did not file a motion for reconsideration, nor a motion to inquire as to the judge's reasons to grant a new trial, nor a request for findings of fact and conclusions of law, nor any other pleading directed at her order. Specifically, Petitioners did not raise the challenges asserted here that Judge Wood's exercise of discretion or her failure to state reasons in her order violated due process.

4. Three months after Judge Wood's order was entered, Petitioners first sought to mandamus Judge Wood based upon her exercise of discretion or her failure to state reasons in her order. The constitutional challenges were raised for the first time in the court of appeals.

5. Both the court of appeals and the Texas Supreme Court denied mandamus relief against Judge Wood. *See* Petition at 1a-3a.

REASONS FOR DENYING CERTIORARI

1. Petitioners Did Not Properly Raise the Questions Presented Here.

The first reason for denying certiorari is that the question presented was not properly raised in the state court. The issues before this Court were never presented to the trial court.

Although it is difficult to glean what remedy Petitioners seek in their petition, if the question assails Judge Wood's failure to state reasons for her order, the Petitioners should have at least asked her to state her reasons in the order.[1] Here, the Petitioners never moved Judge Wood to exercise her discretion in any manner, other than to deny plaintiffs' motion to grant a new trial. The Petitioners also failed to raise any due process challenges in the trial court.

To be entitled to mandamus relief, a relator (the petitioner in Texas) must make a clear demand on the trial court to act and that demand must be refused by the trial

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1. In the *Avala* case in which certiorari was denied on the same question this term (No. 91-830), the trial judge explained his reasons for the grant of new trial at a hearing on the defendant's motion for reconsideration. No motion for reconsideration has ever been filed by the Petitioners in this case.

court. *See Stoner v. Massey*, 586 S.W.2d 843, 846 (Tex. 1979). Further, under Texas practice, to be entitled to complain of error on appeal, the party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make, *and* the party must get a ruling on the request, objection, or motion. Tex. R. App. P. 52(a); *Cunningham v. R.W. McPherson & Assoc., Inc.*, 392 S.W.2d 145, 147 (Tex. Ct. App. 1965, writ ref'd n.r.e.) (court of appeals has no jurisdiction "because the complaint was not in any manner called to the attention of the trial court"). Petitioners presented no request, objection, or motion to Judge Wood after her grant of new trial.

If, on the other hand, the question presented involves the failure of Texas courts of appeals to provide mandamus relief for grants of a new trial, Judge Wood had nothing to do with that -- and a mandamus order directed at her would not accomplish that result. Rather, under Texas procedure, the issue should have been properly raised as a petition to the Texas Supreme Court to direct the court of appeals (not Judge Wood) to grant mandamus relief. *See Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985).

If an issue is not first raised in the trial court, it cannot be raised in this Court. *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952). And, if state procedural requirements are not satisfied, this Court will refuse review. *See Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 309 (1903).

For these reasons, Respondents ask the Court to deny review here.

2. Texas Procedure Does Not Violate Due Process.

Not only were the constitutional issues not preserved, but also the Petitioners' constitutional premises are unsound.

The Petitioners maintain that the trial court's unreviewable (and interlocutory) grant of a new trial deprived them of property without due process of law. There are two fundamental flaws to that argument.

First, there is no constitutional due process right to mandamus review, or indeed any appellate review, of a state trial court's action. *See, e.g., Jones v. Barnes*, 463 U.S. 745, 751 (1983)("There is, of course, no constitutional right to an appeal ...."); *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973)("This Court has long recognized that ... due process does not require a state to provide an appellate system"); *McKane v. Durston*, 153 U.S. 684, 687 (1984)("whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each state to determine for itself").

In Texas, the opportunity to have a judgment or order of a trial court reviewed by an appellate court exists as "a privilege only" and not as a matter of right. *Equitable Life Assur. Soc. of the United States v. Murdock*, 219 S.W.2d 159, 164 (Tex. Ct. App. 1949, writ ref'd n.r.e.).[2] From the earliest days, Texas has sought to protect the inherent power of trial courts to grant a new trial and has precluded mandamus or appellate review except in rare instances.[3]

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2. In 1925, as a legislative experiment, Texas enacted a statutory right to appeal "every order ... in civil cases granting motions for new trial." *Brown v. American Finance Co.*, 432 S.W.2d 564, 567 n.1 (Tex. Ct. App. 1968, writ ref'd n.r.e.). "But the experiment was unsuccessful" and the legislature revoked the right to appeal grants of new trial two years later. *Id.; see also Equitable Life*, 219 S.W.2d at 164.

3. The discretion of Texas trial courts, while plenary, is not entirely unfettered. By statute, Texas provides that no more than two new trials shall be granted either party in the same cause because of insufficiency or weight of the evidence. Tex. R. Civ. P. 326. Further, appellate courts have recognized limitations. *See, e.g., Ex Parte Trick*, 576

Texas' historic scheme of appellate review does not implicate due process concerns. *See Ownbey v. Morgan*, 256 U.S. 94, 110-12 (1921).

The second fundamental flaw in Petitioners' due process argument is their claim that they have been deprived of "property," as that term is understood in the Fourteenth Amendment. Indeed, Petitioners aver that "[t]here is no question that a significant deprivation of property is at stake here." *See* Petition at 11.

However, before any due process protection is required, a party must first demonstrate an existing property right under *state* law. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 604 (1972) (Burger, C.J., concurring) ("Property interests ... are created and their dimensions are defined by existing rules or understandings from an *independent source* such as state law") (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)) (emphasis added).

No Texas statute or rule of procedure establishes a property right to a judgment while that judgment remains subject to the court's plenary power. *See* Tex. R. Civ. P. 329b(e) ("If a motion for new trial is timely filed by any

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S.W.2d 437, 439 (Tex. Ct. App. 1978, orig. proceeding) (after judgment is final, trial court cannot amend judgment or grant new trial); *Ferree's Band Instrument Tools & Supplies, Inc. v. Claxton*, 472 S.W.2d 334, 335 (Tex. Ct. App. 1971, no writ) (court cannot enlarge the time for filing motion for new trial); *McClung v. Camp*, 452 S.W.2d 727, 728 (Tex. Ct. App. 1970, writ ref'd n.r.e.) (motion for new trial cannot be filed by a stranger to the judgment); *Chantre v. National Maritime Union Pension & Welfare Plan*, 425 S.W.2d 659, 660 (Tex. Ct. App. 1968, no writ) (court cannot reenter order so as to extend appellate deadlines); *Buttery v. Betts*, 422 S.W.2d 149, 151 (Tex. 1967) (court, in one case, cannot grant new trial in another case); *Blain v. Broussard*, 99 S.W.2d 993, 995-96 (Tex. Ct. App. 1936, no writ) (court, in a divorce case, cannot grant new trial to set aside divorce if plaintiff or defendant has died).

party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely-filed motions are overruled ....). Texas has always provided "broad discretion" to trial courts to grant a new trial "in the interest of justice and fairness." *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985).

Since the order is interlocutory and there is no final judgment, and since the dispute between the parties has not been finally resolved, a party has no expectation of, and cannot be deprived of, a property interest under the Fourteenth Amendment. As one Texas court recently held, "[s]o long as a judgment is subject to the trial court's plenary power, no vested right subject to due process protection arises." *Scott v. Scott*, 774 S.W.2d 307, 308 (Tex. Ct. App. 1989, no writ); *see also Burroughs v. Leslie*, 620 S.W.2d 643, 644 (Tex. Ct. App. 1981, writ ref'd n.r.e.)[4]

In fact, on retrial, Petitioners may again prevail. Petitioners have not been denied a right to trial by jury or any other substantive right. *See Ingersoll-Rand Co. v. Harrington*, 805 S.W.2d 597, 601 (Tex. Ct. App. 1991, no writ) ("Nor were any of its substantive rights diminished by granting the motion [for new trial]"). The due process challenge is, at best, premature.

And, equally important, all requirements of due process have been fully satisfied. Judge Wood provided all parties proper notice and a full and unrestricted opportunity to be heard on the record before she made the decision to grant a new trial. The diligence with which Judge Wood

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4. This is not a case like *Haslip* where a property interest was adjudicated by final judgment. *See Pacific Mut. Life Ins. Co. v. Haslip*, 113 L.Ed.2d 1, 13 (1991).

approached her task is evident on each page of the lengthy transcript. *See* Petition at 5a-39a. Judge Wood is an experienced and able judge who wrestled long and hard with the soul-searching decision she was forced to make. *See* Petition at 18a. The Petitioners have failed to show, and cannot show, any arbitrary action by Judge Wood in her grant of the new trial.

Because Texas appellate procedure does not implicate due process, because there is no recognized property interest under state law, and because Judge Wood acted within her inherent discretion, Respondents request that this Court deny certiorari.

3. There Is No Requirement That Reasons for the Grant of New Trial Be Stated in the Order.

Also, Petitioners appear to seek as a "standard" -- which they ask this Court to engraft into the Texas appellate system -- that a trial court judge state her reasons for the grant of a motion for new trial in the new trial order.

Such has never been Texas law and for good reason. The rules grant *plenary* power to the trial judge to grant new trials in the "interests of justice." One Texas court has explained why this plenary power is necessary:

> The trial court having the parties, the witnesses and counsel before it, and the opportunity to observe their demeanor and conduct during the trial and to note all incidents occurring during its progress likely to affect the results of the trial, is better qualified to judge whether a fair trial has been had and substantial justice done than is the appellate court ....

Equitable Life Assur. Soc. v. Murdock, 219 S.W.2d 159, 169 (Tex. Ct. App. 1949, writ ref'd n.r.e.).

Because justice is not a static concept, a court must often rely on intuition. *See* Roscoe Pound, *Interpretations of Legal History* at 155, collected in *The Spirit of Common Law & Other Writings* (Legal Classics ed. 1985). As Texas courts have recognized, "the judge's decision [to grant a new trial] must many times be intuitive and based on subjective factors concerning the fairness of the trial which will be difficult or impossible to articulate." *American Motorists Ins. Co. v. Sells*, 747 S.W.2d 27, 29 (Tex. Ct. App. 1988, writ denied). To require a court to articulate these often intuitive reasons could chill the liberal exercise of the court's duty to do justice and could contravene Texas policy.

That is not to say that a trial judge *cannot* state his or her reasons for a grant of new trial. Texas courts have recognized that, although not required, a trial judge *may* make expressed findings of fact and conclusions of law with regard to his or her decision on the motion for new trial. *See Shop Rite Foods, Inc. v. Upjohn Co.*, 619 S.W.2d 574, 582 (Tex. Ct. App. 1981, writ ref'd n.r.e.). However, in this case, the Petitioners never requested that Judge Wood file findings of fact and conclusions of law or even state her reasons. Any error was waived. *Id.* at 583.

Moreover, if the failure to state reasons for a grant of a new trial is a constitutional infirmity, then it has reached epidemic proportions. This Court has recognized that in federal court, "[a] trial judge is not required to enter supporting findings of fact and conclusions of law when granting a new trial motion." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 n.3 (1980). This Court also found that since a trial judge does not have to state all his reasons in the oral order, "it would seem all but impossible for the Court of Appeals to hold as a matter of law that the

trial court clearly abused its discretion in entering the new trial order." *Id.* Federal courts also preclude mandamus review of a grant of a new trial order in order to protect the inherent discretion of the trial court to grant a new trial. *Id.* at 36.

To hold otherwise would be to permit mandamus review of all state trial judges' discretionary rulings. Each ruling made by a trial judge within his or her discretionary jurisdiction would be subject to a due process challenge for failure to articulate a reason. This Court and other appellate courts would be deluged with due process challenges to rulings on evidence, rulings on witnesses, rulings on sanctions, rulings on discovery abuse, grants of summary judgment, grants of mistrial, refusals of jury issues or instructions, and so forth. The wheels of justice would grind to a halt as litigants descended upon appellate courts in efforts to force judges to state reasons for every discretionary and legally permissible result.

There is no wisdom or justice in the rule that Toyota would advocate. Toyota only desires a result. For these reasons also, the Respondents request that certiorari be denied.

4. Mandamus Is Not The Proper Remedy.

Finally, certiorari should be denied because mandamus is not the proper vehicle for the challenge Toyota wishes to mount.

As the Texas Supreme Court recently held in a landmark case on mandamus, in order to be entitled to mandamus, "[t]he relator must establish that the trial court could reasonably have reached only one decision." *Walker v. Packer*, 1992 WL 28419 (Tex. Feb. 19, 1992) (not yet published). Toyota has presented no errors of law in its

petition.[5] It seeks only to challenge Judge Wood's exercise of discretion, a matter clearly not the subject of a Texas (or, for that matter, federal) mandamus. *Johnson*, 700 S.W.2d at 917-18; *Allied Chemical Corp.*, 449 U.S. at 35-37.

Nonetheless, Toyota seeks to justify its request for mandamus relief by its contention that it does not have an adequate remedy at law since in an appeal from a second judgment an appellant cannot challenge the trial court's original grant of a new trial. There are four problems with that contention.

First, to justify the extraordinary writ of mandamus, Texas requires *both* that the relator prove the trial court could have reached only one decision *and* that there is no adequate remedy at law. *Walker v. Packer*, 1992 WL 28419 at 4-5 (citing *Johnson*, 700 S.W.2d at 917). The Petitioners cannot establish their right to mandamus relief under the first prong, so they can never reach the second prong.

Second, it is not shown that the Petitioners have no adequate remedy by appeal. Certainly, they would have just as good (and probably better) an opportunity to raise these same issues on appeal from a second judgment, unrestricted by the stringent mandamus review.

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5. At the hearing on the motion for new trial, Judge Wood asked the Petitioners for some case law that would permit her to affirm the judgment as to one tortfeasor and grant a new trial as to the other tortfeasor, particularly when rights of contribution are alleged. *See* Petition at 21a, 23a, 25a, 32a-37a. Rule 320 of the Texas Rules of Civil Procedure, the rule relied upon by Petitioners at the hearing, is, on its face, discretionary. *See* Tex. R. Civ. P. 320. Despite the fact that this was a focal issue at the new trial hearing, the Petitioners never submitted a supplemental brief with any case authority which supported their position. And now, through two mandamus petitions and this petition, the Petitioners have still not provided any authority to require, or even allow, affirmance as to one tortfeasor and a new trial as to another.

Third, the fact that the Petitioners will be forced to undertake additional expenses in the trial of this case does not rise to the level of an inadequate remedy by appeal. The Texas Supreme Court, earlier this year, expressly overruled "any other authorities to the extent that they imply that a remedy by appeal is inadequate merely because it might involve more delay or cost than mandamus." *Walker*, 1992 WL 28419 at 7.

Finally, because the trial court's grant of a new trial is an interlocutory order, later events might make issues raised here moot. The Petitioners might prevail on a second trial and thus, not need to appeal. Or, the case might be settled. Or, intervening decisions or legislation might alter the challenged rules. The Petitioner's challenge to the state court's interlocutory order is premature.

No good purpose would be served in the allowance of this unauthorized and premature mandamus challenge to a state trial court's inherent discretion. The Petitioners contend that a grant of certiorari "need not and would not prompt myriad challenges to state procedural rules ...." *See* Petition at 17. But, if a state trial court's discretion can be reviewed on mandamus in this instance, then each time a state judge fails to state his or her reasons for a discretionary ruling and each time a state court appellate system acts to prevent appellate review of certain rulings, this Court will be forced to evaluate the constitutionality of state court litigation and appellate practice.

Neither the vehicle used here, nor the due process arguments advanced, warrant Petitioners' attempt to circumvent established state court procedure.

CONCLUSION

For these reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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